No. 17-587

IN THE

Supreme Court of the United States

MOUNT LEMMON FIRE DISTRICT,

Petitioner,

v.

JOHN GUIDO AND DENNIS RANKIN,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENTS

Jeffrey L. Fisher
David T. Goldberg
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Don Awerkamp
Counsel of Record
Shannon Giles
AWERKAMP, BONILLA &
GILES, PLC
6981 North Oracle Road
Suite 155
Tucson, AZ 85704
(520) 798-5282
da@abdilaw.com

QUESTION PRESENTED

Whether the Age Discrimination in Employment Act (ADEA) carries a numerosity requirement with respect to political subdivisions of states.

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BRIEF FOR RESPONDENTS

Respondents John Guido and Dennis Rankin respectfully request that this Court affirm the judgment of the court of appeals.

STATEMENT OF THE CASE

A. Statutory background

The Age Discrimination in Employment Act (ADEA) prohibits employers from taking certain employment actions on the basis of age. 29 U.S.C. § 623(a). Housed in Title 29—the "labor" title—of the U.S. Code, the statute is designed "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." Pub. L. No. 90-202, § 2(b), 81 Stat. 602, 602 (1967). In service of those ends, the ADEA incorporates the "powers, remedies, and procedures" of the Fair Labor Standards Act (FLSA). 29 U.S.C. § 626(b); *see Lorillard v. Pons*, 434 U.S. 575, 578-80 (1978).

As originally enacted, the ADEA applied only to private employers with twenty-five or more employees. Pub. L. No. 90-202, § 11(b), 81 Stat. at 605. Indeed, the Act expressly excluded states and political subdivisions from its ambit. *Id.* But in 1974, as part of a broader bill also amending the FLSA to cover all governmental employers, Congress expanded the coverage of the ADEA. The 1974 amendments lowered the numerosity requirement governing private employers from twenty-five employees to twenty; added a separate provision covering agencies in the federal government; and extended the ADEA's

mandate to state government entities. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(1)-(3), (b)(2), 88 Stat. 55, 74-75 (codified as amended at 29 U.S.C. §§ 630, 633a).

As amended, Section 630(b) of the ADEA, which defines the term "employer" for purposes of the Act's coverage, provides in relevant part:

> The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

29 U.S.C. § 630(b).

The Equal Employment Opportunity Commission (EEOC) administers the ADEA. *See* 29 U.S.C. § 628. Since the mid-1980s, the EEOC has taken the position that the twenty-employee minimum does not apply to political subdivisions. *See Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 270 n.1 (7th Cir. 1986); *see also EEOC v. Monclova Township*, 920 F.2d 360, 362 (6th Cir. 1990) (noting the EEOC's position that the text of Section 630(b) "unambiguously excludes [political subdivisions] from the minimum number of employees requirement" and that "no reason exists to avoid [Section 630(b)'s] statutory language"). The EEOC now codifies this position in its compliance manual. *See* U.S. Equal Emp't Opportunity Comm'n,

Compliance Manual § 2-III(B)(1)(a)(i) (2009) [hereinafter *EEOC Compliance Manual*] ("A state or local government employer is covered under the ADEA regardless of its number of employees.").

B. Factual and procedural background

1. Respondents John Guido and Dennis Rankin began working in 2000 for petitioner, the Mount Lemmon Fire District. Pet. App. 19a. The Fire District provides fire protection to a 12.5-square mile area of the Santa Catalina Mountains in the Coronado National Forest, just outside of Tucson, Arizona. *See* Mount Lemmon Fire, http://www.mtlemmonfire.org (last visited July 1, 2018). An enclave of second homes—known as Summerhaven—populates the District's upper elevations. *See Mt. Lemmon/Summerhaven Information*, http://mtlemmon.com/summerhaven (last visited July 1, 2018).

By 2005, both respondents had risen within the Fire District to the rank of captain. Pet. App. 19a. They were among the District's most credentialed full-time employees. Mr. Guido was a former officer in the Arizona National Guard, a certified Senior Fire Inspector, and one of the District's two certified paramedics; Mr. Rankin had worked in public safety since 1973, including holding positions as a firefighter and arson investigator. Pls.' Rule 56.1 Statement of Facts ¶¶ 6, 9-10, 20. They were also the two oldest full-time employees: Mr. Guido was forty-six years old, and Mr. Rankin was fifty-four. *Id.* ¶¶ 16, 26, 31.

In 2009, the Fire District confronted a "budget shortfall" of approximately $67,000. Pet. 8; Petr. Br. 11. It was not immediately clear how the District would address the shortfall. But the District's fire chief released a memorandum promising that, in the

event the District had to terminate any employees, its paramedics would have priority for retention. *See* Pls.' Rule 56.1 Statement of Facts ¶ 38. Three months later, the District decided to lay off employees.

The Fire District selected Mr. Guido and Mr. Rankin for termination. It then replaced them as captains with two younger people. One of the replacements was twenty-eight years old with only six years of experience as a firefighter. Pls.' Rule 56.1 Statement of Facts ¶¶ 32-33.

The Fire District later claimed that it laid off Mr. Guido and Mr. Rankin because they had not participated in recent years in voluntary shifts fighting wildland fires. *See* Def.'s Rule 56.1 Statement of Facts ¶ 20. Yet nothing in either Mr. Guido's or Mr. Rankin's letter of termination (or any oral statement accompanying them) discussed wildland fire assignments. Pls.' Rule 56.1 Statement of Facts ¶¶ 46, 53. And one of the employees replacing Mr. Guido and Mr. Rankin as a ranking captain had gone on no such voluntary assignments in the preceding two years either. *See id.* ¶¶ 32, 62-63.

2. Believing the real reason for their terminations was their age, Mr. Guido and Mr. Rankin filed timely charges with the EEOC, alleging that the Fire District had fired them in violation of the ADEA. Pet. App. 3a. After an investigation, the EEOC issued letters finding reasonable cause to believe that the Fire District had indeed violated the ADEA. *Id.*

3. Respondents then filed suit in the U.S. District Court for the District of Arizona, alleging age discrimination under the ADEA.

After a short period of discovery, the Fire District moved for summary judgment. As relevant here, the

Fire District argued that the ADEA covers political subdivisions only if they have twenty or more employees, and it asserted that it had fewer than twenty employees during the relevant time period. Pet. App. 20a-21a.

In a cross-motion for partial summary judgment, respondents disputed both of the Fire District's assertions. First, respondents maintained that because the ADEA's definition of "employer" separates private from public employers and contains no numerosity requirement in the public employer sentence, the statute carries no numerosity requirement for political subdivisions. Pet. App. 21a-22a. Second, respondents contended that, in any event, the Fire District had more than twenty employees. *See id.* 26a-27a. In support of the latter contention, respondents noted that the District listed more than twenty employees on its wage reports, *id.* 29a-31a, and that it also retained additional "volunteers" on its staff, at least two of whom received pension benefits and workers' compensation coverage, *id.* 36a-37a.

The district court granted the Fire District's motion. The court acknowledged that the only published opinion in nearly twenty years dealing with the ADEA's application to political subdivisions had held that the "clear" language of Section 630(b) settles that the statute applies to all political subdivisions, regardless of size. Pet. App. 25a n.4 (citing *Holloway v. Water Works & Sewer Bd.*, 24 F. Supp. 3d 1112, 1117 (N.D. Ala. 2014)). But, with no elaboration, the district court pronounced the provision "ambiguous." Pet. App. 25a. It then elected to follow the Seventh Circuit's 1986 decision in *Kelly v. Wacuconda Park District*,

which held that the ADEA's numerosity requirement applies to political subdivisions because parts of the legislative history indicated the 1974 amendments were designed "to put public and private employers on the same footing," 801 F.2d at 271-72. *See* Pet. App. 22a-25a.

The district court also agreed with the Fire District that it had "no more than 19 qualifying employees." Pet. App. 26a. The court reasoned that only nineteen of the firefighters on the wage reports had in fact worked and been paid during the relevant period, *id.*, and that none of its other associated individuals had received "substantial benefits" from the District, *id.* 37a.

4. Respondents appealed, and the EEOC filed an amicus brief reiterating its "longstanding" position that the ADEA covers "political subdivisions of any size." EEOC C.A.9 Br. 4-5. The Ninth Circuit agreed and unanimously reversed. Pet. App. 17a.

Writing for the panel, Judge O'Scannlain explained that Section 630(b) "is not ambiguous." Pet. App. 14a. The statute's directive that the term "employer" "also means" a political subdivision of a state, the court of appeals explained, "adds another definition" on top of the previous definition of employer relating to private employers; "it does not clarify the previous definition." *Id.* 7a. And because the statute imposes a numerosity requirement only for private employers, the court of appeals concluded that there is no such requirement for political subdivisions. *Id.* 7a, 14a.

Finding the text's meaning to be "plain," the court of appeals found no need to try to surmise Congress's intent. Pet. App. 14a, 16a-17a. It nevertheless

explained that "[e]ven if we agreed with the Fire District and concluded that the statute is ambiguous—which we do not—the outcome would not change." *Id.* 14a. Amendments to Title VII two years before Congress amended the ADEA provided a model of how a numerosity requirement can apply to political subdivisions. *Id.* 15a. But the ADEA's amendments diverge from that model, reinforcing from the panel's perspective that the "best reading" of the ADEA is that Section 630(b)'s twenty-employee minimum "does not apply to a political subdivision of a State." *Id.* 14a-15a.

Finally, the court of appeals noted that the legislative history on which the district court had relied does not "address the specific question before us." Pet. App. 15a. In particular, the "vague language about ensuring the same rules apply" to employees in the public and private sectors "never states that the twenty-employee minimum should apply to political subdivisions." *Id.* 16a. Insofar as the legislative history addresses that question at all, the court of appeals reasoned, it separates public from private employers and suggests the contrary. *Id.*

SUMMARY OF THE ARGUMENT

I. The ADEA provides that the term "employer" "also means . . . [a] political subdivision of a State." 29 U.S.C. § 630(b). The explicit and unqualified nature of this provision dictates that the state's nondiscrimination mandate applies to political subdivisions regardless of size. The statute's coverage of private employers carries a numerosity requirement, but the transitional phrase "also means" creates a distinct, freestanding category of public employers.

All other traditional interpretive tools point in that same direction. For one thing, Title VII provided a ready template if Congress had wished for the 1974 ADEA amendments to cover political subdivisions subject to a numerosity requirement. Yet Congress took a different approach, suggesting it intended a different result. The legislative history of the 1974 amendments supports this inference. Legislators described the changes to the ADEA as a "logical extension" of changes they were making to the FLSA, which was amended to cover political subdivisions without any numerosity requirement. Finally, the EEOC has exercised its informed judgment to conclude that the ADEA applies no numerosity requirement to political subdivisions.

II. The Fire District's counterarguments lack force. It is not anomalous for the ADEA, but not Title VII or the Americans with Disabilities Act, to cover small political subdivisions. The ADEA's powers and remedies—including many definitional provisions—are drawn from the FLSA, which covers political subdivisions regardless of size. Other federal and state laws prohibiting age discrimination and similar labor practices do the same.

Nor does reading Section 630(b) according to its plain terms create problems respecting the statute's coverage of agents of private employers. The agent clause independently covers third-party entities, so it does not matter here whether it also sweeps in individual employees. And because common law principles that are contained in all employment discrimination statutes already ensure that all covered employers are subject to respondeat superior liability for disparate treatment claims, it is

immaterial that Section 630(b) does not have a parallel agent clause respecting public employers.

The Fire District's constitutional arguments similarly lead to dead ends. The federalism canon of construction does not apply to unambiguous statutes. Nor does it apply to statutes that merely establish liability rules for political subdivisions. Furthermore, Congress has ample power under the Commerce Clause to regulate the employment practices of public employers of all sizes—as it has in other statutes.

Finally, Section 630(b) does not threaten to impair the operations of small political subdivisions. Most states have decided on their own to subject such employers to liability for discriminating on the basis of age, and such entities have ample tools for managing any litigation costs that arise. This Court should enforce the ADEA as written.

ARGUMENT

I. The ADEA's coverage of political subdivisions contains no numerosity requirement.

The plain language of 29 U.S.C. § 630(b) makes clear that the ADEA covers political subdivisions without any numerosity limitation. The ADEA's structure, statutory history, and the EEOC's longstanding view confirm that the statute covers all political subdivisions, regardless of size.

A. Section 630(b)'s text dictates that it covers political subdivisions regardless of size.

1. "As always, we start with the specific statutory language in dispute." *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018). Section 630(b) first defines "employer" to "mean[] a person engaged in an industry affecting

commerce who has twenty or more employees." 29 U.S.C. § 630(b). It then adds that "[t]he term *also means* . . . a State or political subdivision of a State." *Id.* (emphasis added). The question presented thus turns on a simple inquiry: Does "also means" *add* a new category to the definition of "employer," or does it—as the Fire District argues—merely *clarify* the definition provided in Section 630(b)'s first sentence?

No one disputes that "means" in Section 630(b)'s first sentence introduces a definition. *See Mean*, Oxford Eng. Dictionary, https://tinyurl.com/mean-oed-defn (last updated Mar. 2001) (to "mean" is "to convey or carry a meaning"). And the word must have the same function in the second sentence of Section 630(b) as in the section's first sentence. *See NASA v. FLRA*, 527 U.S. 229, 235 (1999) (statutory phrases "ordinarily retain the same meaning wherever used in the same statute"). So the "means" in "also means" must be definitional as well.

That brings us to the word "also." The ordinary meaning of "also" is "in addition." Take, for instance, the hypothetical statement posited by the court of appeals: "The password can be an even number. The password can *also* be an odd number greater than one hundred." Pet. App. 7a-8a (emphasis added). It is unmistakable in this example that the second sentence provides a new and distinct category of passwords. It is likewise clear that "the clarifying language" in the second category (greater than one hundred) "does not apply to both definitions." *Id.* 8a.

The Fire District objects that the two categories in this illustration are "mutually exclusive." Pet. 28. But that is precisely the point. The word "also" is the most natural transition between two categories that are

separate and nonoverlapping. *See Liteky v. United States*, 510 U.S. 540, 566 (1994) (Kennedy, J., concurring in the judgment) ("Congress' inclusion of the word 'also' indicates that subsections (a) and (b) have independent force."). Dictionaries confirm this common-sense understanding. Definitions of "also" suggest addition: "likewise"; "in addition"; "besides"; "too." *See Also*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2014); *see also Also*, Oxford Eng. Dictionary, https://tinyurl.com/also-oed-defn (last updated June 2011) (defining "also" as "in addition").[1]

Putting the two words together, it is apparent that the phrase "also means" in Section 630(b) unambiguously introduces a new, freestanding component of the ADEA's definition of "employer." 29 U.S.C. § 630(b). The ADEA covers private "person[s]" with twenty or more employees. It "also" covers states and political subdivisions, regardless of the number of employees.

2. Reading "also means" in Section 630(b) to signal a new, separate part of the definition accords with the

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[1] The Fire District complains that "the Oxford English Dictionary does not even list [this] meaning first." Petr. Br. 18. But the order in which a dictionary lists definitions does not "establish an enduring hierarchy of importance." *See Webster's Third New International Dictionary* 17a (1971). Instead, definitions are listed "in the order in which they . . . have arisen." 1 *Oxford English Dictionary*, at xxviii-xxix (2d ed. 1989). Thus, the best definition "is the one that most aptly fits the context of an actual genuine utterance." *Webster's Third New International Dictionary*, *supra*, at 17a. *See generally* Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. Rev. 1915, 1926-38.

way Congress typically uses the phrase. Beyond Section 630(b), there are thirty-two places in which the U.S. Code uses the phrase "also means."[2] It consistently operates as a restart of a definition, often—as in Section 630(b)—adding components to a term defined in multiple subparts.

Take 15 U.S.C. § 1471(3), which defines the term "package." It begins by defining "package" to "mean[] the immediate container or wrapping in which any household substance is contained." *Id.* The statute then says that under certain circumstances, the term "*also means* any outer container or wrapping used in the retail display of any such substance." *Id.* (emphasis added). This second definition does not merely clarify the initial definition. Instead, the phrase "also means" separates the two definitions—sealing off the "immediate container" category from the "outer container" category—and signals that the latter is its own freestanding class.

A further example is even more illuminating. In 12 U.S.C. § 1715z-1(i)(4), the term "elderly families" is defined for purposes of eligibility for housing assistance. The statute first defines the term to "mean[] families which consist of two or more persons the head of which . . . is sixty-two years of age or over

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[2] For all other occurrences of the phrase, see 7 U.S.C. § 2031(j)(3); 12 U.S.C. §§ 1141j(a), 1715z-1(i)(4); *id.* § 1715z-1(s)(2)(D)(iv) (twice); 15 U.S.C. §§ 78c(a)(3)(A), 1471(3), 6809(9), 7006(1); 16 U.S.C. §§ 1532(15), 3371(h), (j)(1); 26 U.S.C. §§ 170(c), 316(b)(2)(A), (b)(3), 401(c)(3), 507(d)(2)(A), 512(a)(3)(B), 581, 1250(b)(4), 4958(c)(3)(C)(i), 7503; 31 U.S.C. § 6501(4)(B); 38 U.S.C. § 3452(b) (twice); 42 U.S.C. §§ 1437a(c)(2), 1471(b)(3); *id.* § 1485(e)(1) (twice); *id.* §§ 6372(2), 8259(6); and 46 U.S.C. § 31301(6)(B).

or is handicapped." *Id.* It then continues, "Such term *also means* a single person who is sixty-two years of age or over or is handicapped." *Id.* (emphasis added).

If "also means" simply signaled a clarification that a particular entity is included in a previous definition, Congress would have had no need to repeat "who is sixty-two years old or is handicapped" in the second part of this definition. Instead, Congress could have written just that the term "also means a single person." But because "also means" starts a new and distinct definition, it was necessary for Congress to repeat every element of the definition it meant to apply to single persons.

There is no reason to think that Congress used the phrase "also means" in the ADEA differently from how the phrase is used throughout the rest of the U.S. Code. When Congress wrote in Section 630(b) that employer "also means" political subdivisions, it supplied a new definition without carrying forward the numerosity limitation that is attached to the earlier category of employers. Just as the phrase operates elsewhere, the transition "also means" sets off a new and freestanding class, not a continuation of the initial classification.

3. The plain meaning of Section 630(b) is so apparent that when referencing the statute in the past, this Court has taken for granted that the numerosity requirement that applies to private employers does not apply to political subdivisions.

When first considering the ADEA's application to state agencies, the Court noted that the 1974 amendments "extended the substantive prohibitions of the Act to employers having at least 20 workers, *and* to the Federal and State Governments." *EEOC v.*

Wyoming, 460 U.S. 226, 233 (1983) (emphasis added). Reversing the order of the employer categories, the Court later described the 1974 amendments as "extend[ing] coverage to Federal, State, and local Governments, *and* to employers with at least 20 workers." *Johnson v. Mayor of Balt.*, 472 U.S. 353, 356 (1985) (emphasis added).

These two passages largely speak for themselves, treating the ADEA's coverage of political subdivisions as wholly independent of the numerosity requirement for private employers. Lest there be any doubt, notice that the passages in both cases lump together federal and state government employers. All agree that the ADEA covers federal employers without any numerosity requirement. *See* 29 U.S.C. § 633a; *EEOC Compliance Manual*, *supra*, § 2-III(B)(1)(a)(i) n.97 ("Federal agencies are covered under separate sections of Title VII, the ADEA, and the Rehabilitation Act, regardless of the number of employees they have."). This suggests the Court likewise has understood that the statute's coverage of states and political subdivisions lacks any numerosity requirement.

B. The structure of Section 630 reinforces that the numerosity limitation that applies to private employers does not apply to political subdivisions.

The Fire District does not dispute that the text of Section 630(b)'s political subdivision clause itself indicates that the statute's numerosity requirement does not apply to political subdivisions. Yet the Fire District argues that the broader structure of Section 630—especially its definition and treatment of "persons"—suggests that the ADEA exempts small political subdivisions. Petr. Br. 19-24. But in reality,

the structure of Section 630, just like the plain meaning of the political subdivision clause, dictates that the ADEA covers political subdivisions regardless of size.

1. Section 630 is the ADEA's definitional provision. So the place to start, to determine whether any particular type of entity is an "employer" under the ADEA, is with Section 630(b)'s comprehensive definition of that specific term. And because Section 630(b) explicitly addresses the "employer" status under the ADEA of "a political subdivision of a State," that is the end of the matter. The ADEA's separate definition of the term "person" is simply irrelevant.

Attempting to create ambiguity where none exists, the Fire District urges this Court to answer the question presented by reading Section 630(b) in a highly unnatural way. The Fire District proposes that after learning from the first sentence that an "employer" means a "person" with twenty or more employees, the Court should pause. Instead of continuing to read the next sentence, the Fire District suggests that the Court jump to Section 630(a), which defines "person." And if the Court thinks, after taking that detour, that the word "person" can be stretched to cover political subdivisions, it should then return to Section 630(b) and ask whether anything else in the statute "overrides" the implication that political subdivisions are employers only if they have twenty employees. *See* Petr. Br. 25-26.

This methodology is as misguided as it is unnatural. An example demonstrates why. Suppose a university sports arena reserves a block of seats for "special fans." A sign then explains: "The term 'special

fan' means any booster who donated at least $1000 during the past year. The term also means (1) anyone accompanying such a person and (2) faculty members."

Upon seeing this explanation, no professor would feel a need to ask what "booster" means before sitting in one of the reserved seats. This is because the sign's definition of "special fan" expressly covers "faculty." The principle is simple: When given a comprehensive definition (or other sort of explanation), one should take in the *entire* definition before seeking clarification. If part of the full definition explicitly and unequivocally answers the question, the reader need not take pains to see if some other part might indirectly address the issue.

For the same reason, professors reading the sign above would understand that they need not have donated money to the university last year to sit in a reserved seat. Even though "boosters" and faculty members might in the abstract be "overlapping rather than mutually exclusive" categories, Pet. 28, the instructions' express treatment of faculty members makes clear that the qualification pertaining to "boosters" does not apply to professors.

Turning back to the question here, the issue is whether a small political subdivision is an "employer" under the ADEA. If one reads Section 630(b) from start to finish, the statute unambiguously answers that question. Accordingly, the Court need not concern itself with the ADEA's treatment of "persons."

2. Even if the ADEA's treatment of "persons" were relevant to the question at hand, the Fire District would find no refuge there. Section 630(a) defines "person" to "mean[] one or more individuals,

partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons." 29 U.S.C. § 630(a). The Fire District's theory is that the final, residual phrase "any organized groups of persons" captures political subdivisions, thereby rendering the numerosity limitation that Section 630(b) attaches to "persons" applicable to such entities. *See* Petr. Br. 20-21. But this theory (a) flouts basic principles of statutory interpretation and (b) ignores the way in which Congress approached the political subdivision amendments to the ADEA.

a. It is a fundamental canon of statutory construction that "[h]owever inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of same enactment.'" *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944) (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)). This is "particularly" so where the two provisions "are interrelated and closely positioned, both in fact being parts of [the same statutory scheme]." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (alteration in original) (quoting *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam)).

This rule controls here. The word "person"—both standing alone, and as defined (somewhat circularly) as "any organized group[] of persons"—is indisputably more general than Section 630(b)'s direct and explicit reference to "political subdivision[s]." That being so, the ADEA's treatment of "persons" in the first sentence of Section 630(b) cannot blunt the rules

established for political subdivisions in the second sentence.

Besides, it is not even apparent that a political subdivision such as the Fire District falls within the general phrase "organized group of persons." For one thing, political subdivisions are not normally thought of in those terms. An entity such as a fire or water district is more readily conceived of as a geographical construct "that exists primarily to discharge some function of local government." *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 206 (2009) (quoting *Political Subdivision, Black's Law Dictionary* (8th ed. 2004)). Such entities are not typically described as "organizations."[3]

Furthermore, if, as the Fire District contends, the ADEA's definition of "person" encompassed political subdivisions, then Section 630(b)'s explicit treatment of political subdivisions would be pure surplusage. It has long been "a cardinal principle of statutory construction that we must 'give effect, if possible, to

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[3] The Fire District's references to cases holding that the term "person" in other statutes "include[s] local political subdivisions," Petr. Br. 20, does not bridge this divide. All but one of those cases postdate the enactment of the ADEA—and thus tell us nothing about whatever default understanding Congress may have had in 1967 with respect to the meaning of "person." Furthermore, one of the post-enactment cases the Fire District cites, *Monell v. Department of Social Services*, 436 U.S. 658 (1978), overruled a prior decision holding that the word "person" in the statute at issue—42 U.S.C. § 1983—did *not* cover political subdivisions. *See Monroe v. Pape*, 365 U.S. 167 (1961). So if case law relating to Section 1983 were somehow relevant to divining Congress's understanding of the word "person" when it defined that term in the ADEA, it would show exactly the reverse of what the Fire District claims.

every clause and word of a statute.'" *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). Yet the Fire District asks this Court to bend over backwards to construe Section 630(b)'s first sentence as rendering the second sentence redundant. This Court should decline that invitation.

b. The way in which the ADEA was amended in 1974 confirms that Congress never understood the first sentence of Section 630(b) to subsume political subdivisions. In the 1974 amendments, Congress made two changes to Section 630(b). First, it crossed out the statute's exclusion of states and political subdivisions thereof. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(3), 88 Stat. 55, 74. Second, Congress explicitly added political subdivisions as a separate category of "employer." *See id.* § 28(a)(2), 88 Stat. at 74. If Congress had believed the word "person" in Section 630(b)'s first sentence already encompassed states and political subdivisions and wanted such entities covered subject to a numerosity limitation, Congress would have stopped after the first change, leaving a perfectly unambiguous statute—one that would have covered political subdivisions as "employers" and that clearly imposed a numerosity requirement on both public and private employers. That Congress did not do so indicates that it did not think political subdivisions were "persons" and

wanted Section 630(b) to cover political subdivisions independently of its coverage of "persons."[4]

C. The statutory history of the ADEA confirms that its coverage of political subdivisions carries no numerosity requirement.

Where, such as here, a statute's text can reasonably be read only one way, the interpretive inquiry ends with the text's plain meaning. *See, e.g.*, *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016). But looking beyond Section 630(b)'s text and context to the enactment history of the ADEA confirms that the statute's coverage of political subdivisions carries no numerosity requirement.

1. In 1972, two years before Congress enacted the ADEA amendments at issue here, Congress amended Title VII to cover public employers. It did so by amending that statute's definition of "person" to include "governments, governmental agencies, [and] political subdivisions." *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103, 103 (amending 42 U.S.C. § 2000e(a)). With this amendment, Title VII defined (and still defines) the term "employer" as "a person"—a term that, as just mentioned, now expressly includes a state or political subdivision—that is "engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(a)-(b). This statutory language makes

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[4] The same basic reasoning applies to the ADEA's coverage of federal employers. The Fire District contends that such entities "[o]bviously" fall under Section 630(a)'s definition of person. Petr. Br. 23. But if that were so, there would have been no reason for Congress to have provided separately that the ADEA applies to federal employers. *See* 29 U.S.C. § 633a.

clear that both private and public employers are subject to Title VII only if they have the requisite number of employees.

Had Congress wished to apply the ADEA's numerosity requirement to political subdivisions, it could have simply followed this template. That is, Congress could have inserted "political subdivisions" into the ADEA's definition of "person." *See* Pet. App. 10a; *see also Case v. Bowles*, 327 U.S. 92, 98-99 (1946) (referencing a statute defining "person" to include not only any "organized group of persons" but also "political subdivisions"). But it did not. Instead, Congress left alone the ADEA's definition of "person" and amended the statute's definition of "employer" to embrace political subdivisions—separating such entities from the clause addressing "persons" with the transition "[t]he term also means." Faced with these legislative actions, this Court "must give effect to Congress' choice" to deviate from Title VII in amending the ADEA. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013) (quotation omitted).

Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009), cements the point. There, the Court observed that Congress had amended Title VII to authorize claims "in which an improper consideration was 'a motivating factor' for an adverse employment decision." *Id.* at 174 (quoting 42 U.S.C. § 2000e-2(m)). Yet when taking that action, "Congress [had] neglected to add such a provision to the ADEA." *Id.* The Court held that the "negative implication" of that comparison is that the ADEA does not allow mixed motive claims: "We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make

similar changes to the ADEA." *Id.*; *see also EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256-59 (1991) (employing the same reasoning to construe Title VII and ADEA differently in another respect). The same reasoning applies here.

The Fire District responds that because Congress was not drafting the ADEA "from scratch," it had no choice but to rearrange the words "political subdivision" around Section 630(b)'s extant phrase "also means." Petr. Br. 4-5; *see also id.* 4 fig.1 (imagined redline of statute). But Congress is not confined to amending a statute using only words already contained within a particular subsection; amending legislation is not a game of Scrabble or refrigerator magnet poetry. In fact, in the very amendments at issue, Congress altered many sections by adding new words and eliminating existing ones. *See, e.g.*, Fair Labor Standards Amendments § 3, 88 Stat. at 55 ("Section 6(b) is amended (1) by inserting . . . and (2) by striking out . . . ."). Consequently, this Court should assume that Congress retained the phrase "also means" in Section 630(b)'s second sentence not out of a sense of obligation but because inserting political subdivisions after that phrase best effectuated its intent—namely, to set forth an additional category of covered employers in a new, self-contained part of the definition.

2. To the extent relevant, the legislative history of the 1974 amendments to the ADEA also supports reading Section 630(b)'s reference to political subdivisions as a freestanding definition lacking any numerosity requirement. The House report regarding these amendments described the decision to extend the ADEA to cover political subdivisions as a "logical extension of the committee's decision to extend FLSA

coverage to Federal, State, and local governmental employees." H.R. Rep. No. 93-913, at 40 (1974). Those amendments expanded the FLSA's coverage to apply to all political subdivisions regardless of size. *See* Fair Labor Standards Amendments § 6(a)(1)-(2), 88 Stat. at 58-59 (amending 29 U.S.C. § 203(d)-(e)).[5] The only "logical extension" of that decision would have been to do the same under the ADEA.

The Special Committee on Aging's contemporaneous report reinforces that the 1974 amendments were meant to withhold any numerosity requirement from political subdivisions. The Committee explained that the 1974 FLSA amendments included "major improvements for the Age Discrimination in Employment Act: (1) Extension of coverage to Federal, State, and local governmental employees" and "(2) A broadening of the application of the Act to include private employers with 20 or more employees (instead of 25 as under prior law)." S. Spec. Comm. on Aging, 94th Cong., *Action on Aging Legislation in 93d Cong.* 9 (Comm. Print 1975).

Like the Seventh Circuit in *Kelly v. Wacuconda Park District*, 801 F.2d 269 (7th Cir. 1986), the Fire District fastens onto a couple of floor statements by Senator Bentsen that it says point in the other direction. *See* Petr. Br. 45-46. But this Court has recently (and repeatedly) made clear that "floor

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[5] The Fire District claims that Congress "single[d] out" small fire and police departments to be "exempt from the Fair Labor Standards Act." Petr. Br. 55 n.14. Not so. Such employers are not exempt from the FLSA's minimum wage requirements or the statute's coverage generally. Rather, fire and police departments with fewer than five employees are exempt only from the FLSA's maximum hour rules. *See* 29 U.S.C. §§ 207, 213(b)(20).

statements by individual legislators rank among the least illuminating forms of legislative history." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017). They certainly cannot be used "to muddy clear statutory language." *Id.* (quoting *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011)).

Senator Bentsen's remarks scarcely support the Fire District's position anyway. Those statements posited that public and private sector employees should have "the same protections" against age discrimination. *See* Petr. Br. 45-46 (quoting 120 Cong. Rec. 8768 (1974)); *id.* 45 (quoting 118 Cong. Rec. 15,895 (1972)). By "same protections," Senator Bentsen simply meant the same substantive guarantee against age discrimination. As the Ninth Circuit recognized, there is no evidence that his statements evinced an intent—much less a Congress-wide intent—to limit the ADEA's coverage of public entities by imposing a numerosity requirement. *See* Pet. App. 15a-16a.

D. The EEOC has long interpreted the statute to apply to political subdivisions regardless of size.

If any ambiguity remained as to whether the ADEA covers all political subdivisions, the solution would be to endorse the EEOC's long-standing view that the statute covers political subdivisions regardless of size. The EEOC's "policy statements, embodied in its compliance manual and internal directives" reflect a "body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)). Such statements, therefore,

"are entitled to a 'measure of respect'" from the judiciary—that is, they are entitled to *Skidmore* deference. *Id.* (quoting *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 488 (2004)); *see Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944). This is particularly so where, as here, "the agency has applied its position with consistency." *Holowecki*, 552 U.S. at 399; *see also United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001).

The EEOC's compliance manual is clear: "A state or local government employer is covered under the ADEA regardless of its number of employees." *EEOC Compliance Manual*, *supra*, § 2-III(B)(1)(a)(i). Moreover, the EEOC's position on the issue dates back to at least the mid-1980s. *See Kelly*, 801 F.2d at 270 n.1. If this Court harbors any doubt concerning the ADEA's coverage of political subdivisions, it should defer to the agency's "reasonable" interpretation of Section 630(b). *See Holowecki*, 552 U.S. at 401-02.

II. Reading the ADEA to cover political subdivisions regardless of size generates no legal or practical problems.

Urging this Court to "depart from [the] standard dictionary definition" of "also means," *see* Petr. Br. 33—as well as the structural and contextual indicators that Congress meant what it said in the ADEA—the Fire District advances several consequentialist arguments. Applying the ADEA to small political subdivisions, the District contends, creates various legal anomalies, raises constitutional difficulties, and threatens the very "survival" of such entities, Petr. Br. 17. These arguments are incorrect and overblown.

A. The ADEA's coverage of public employers creates no anomaly compared to other antidiscrimination laws.

The Fire District argues that because "[t]he ADEA is part of a trio" of federal statutes prohibiting employment discrimination, it creates an anomaly for the ADEA, but not Title VII or the ADA, to cover public employers regardless of size. *See* Petr. Br. 44, 46-49. But there is no canon of construction requiring statutes with comparable goals to operate in exactly the same way. To the contrary, this Court has repeatedly instructed—including in the precise context of comparing the ADEA and Title VII—that one "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008). Conducting such an examination here reveals that if the ADEA should track any other statute with respect to its coverage of political subdivisions, it should be the FLSA, not Title VII or the ADA.

1. The Fire District is correct that the ADEA's "substantive, antidiscrimination provisions" are modeled after Title VII. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995). But in other ways, the ADEA incorporates labor law instead of civil rights rules. In fact, the ADEA grew out of reports and recommendations from the Secretary of Labor. *See EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983). The Secretary explained that age-based limitations in employment were "rarely . . . based on the sort of animus motivating some other forms of discrimination," but they "deprived the national economy of the productive labor of millions of

individuals and imposed on the governmental treasury substantially increased costs in unemployment insurance and federal Social Security benefits." *Id.* at 231.

In keeping with its objective of giving older workers "the opportunity to engage in productive and satisfying occupations," *Wyoming*, 460 U.S. at 231, the ADEA directly incorporates the "powers, remedies, and procedures" of the FLSA, 29 U.S.C. § 626(b). Put colloquially, while the *what* of the ADEA is related to Title VII, the ADEA's *who*, *when*, and *how*—i.e., the definitions, mechanisms, and remedies of the statute—are drawn from the FLSA. And, as noted above, the FLSA applies to political subdivisions regardless of size. *See* 29 U.S.C. § 203(d)-(e). It should not be surprising, therefore, that the ADEA does the same.

Citing *Lorillard v. Pons*, 434 U.S. 575 (1978), the Fire District insists that this Court has often looked to Title VII "to determine how the [ADEA] should function." Petr. Br. 44. But *Lorillard* actually cuts in the opposite direction. There, an employer maintained that because Title VII did not provide for jury trials, the ADEA should not do so either. *See* 434 U.S. at 583-84. In a unanimous opinion by Justice Marshall, the Court found the employer's "argument by analogy to Title VII unavailing." *Id.* at 584. Because the ADEA "incorporates fully the remedies and procedures of the FLSA," Title VII "sheds *no light* on congressional intent under the ADEA." *Id.* at 582, 585 (emphasis added). When it comes to matters other than the ADEA's substantive prohibitions, the FLSA is the instructive comparator. *See id.* at 580-85.

So too here. Section 630's coverage of political subdivisions parallels the definitional provisions of the FLSA. Both statutes first (and almost identically) define "person." They then use the term "person" to help define "employer." *Compare* 29 U.S.C. § 203(a), (d) (FLSA), *with id.* § 630(a)-(b) (ADEA). And it is in the definition of "employer"—and not "person"—that both statutes extend coverage to public entities. This similarity is by design. "The fact that Congress amended the ADEA itself in the same 1974 Act [that amended the FLSA] makes it more than clear that Congress understood the consequences of its actions." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 76 (2000).

2. Even if one were to look beyond the FLSA for guidance regarding the ADEA's coverage of political subdivisions, there would still be better comparators than Title VII and the ADA.

Start with the ADEA's own treatment of federal employers. The ADEA covers federal agencies irrespective of size. *See* 29 U.S.C. § 633a; *EEOC Compliance Manual*, *supra*, § 2-III(B)(1)(a)(i) n.97. If Congress thought one set of public employees should enjoy the protections of the ADEA regardless of the size of their employers, it makes sense for Congress to have thought the same with respect to the other set of such employees.

Furthermore, "almost every State of the Union" prohibits age discrimination in employment as a matter of state law. *Kimel*, 528 U.S. at 91. A majority of those laws cover political subdivisions regardless of size, even though many also apply numerosity

limitations to private employers.[6] It is hardly anomalous for Congress to have made the same decision in the ADEA.

3. Even comparisons between the ADEA and Title VII fail to support the Fire District's position. When addressing arguments that the ADEA should track Title VII, the Court has stressed that analysis "must focus on the text" of each statute. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009). And where, as here, the statutory texts are "materially different," they must be construed differently. *Id.* at 173.

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[6] Fifteen states have a numerosity requirement for private employers but *not* for public employers. *See* Cal. Gov't Code §§ 12926(d), 12940(a); Del. Code tit. 19, §§ 710(7), 711; Idaho Code §§ 67-5902(6), -5909; 775 Ill. Comp. Stat. 5/1-102(A), /2-101(B)(1), /2-102(A); Kan. Stat. §§ 44-1112(d), -1113; Mo. Rev. Stat. §§ 213.010(8), .055(1)-(2); Neb. Rev. Stat. §§ 48-1002(2), -1004; Ohio Rev. Code §§ 4112.01(A)(2), .14; 43 Pa. Stat. and Cons. Stat. §§ 954(b), 955; 28 R.I. Gen. Laws §§ 28-5-6(8)(i), -7; Tenn. Code §§ 4-21-102(5), -401(a); Tex. Lab. Code §§ 21.002(8), .051; Utah Code §§ 34A-5-102(i), -106; W. Va. Code §§ 5-11-3(d), -9; Wyo. Stat. §§ 27-9-102(b), -105. Fourteen additional states and the District of Columbia have no numerosity requirement for any kind of employer. *See* Alaska Stat. §§ 18.80.220(a), .300(5); Colo. Rev. Stat. §§ 24-34-401(3), -402; D.C. Code §§ 2-1401.02(10), (21), 2-1402.11; Haw. Rev. Stat. §§ 378-1 to -2; Me. Stat. tit. 5, §§ 4553(4), (7), 4572(1); Mich. Comp. Laws §§ 37.2103(g), .2201(a), .2202; Minn. Stat. §§ 363A.03(16), (30), 363A.08; Mont. Code §§ 49-2-101(11), -303; N.J. Stat. §§ 10:5-5(e); -12; N.D. Cent. Code §§ 14-02.4-02(8), (13), 14-02.4-03; Okla. Stat. tit. 25, §§ 1301(1), 1302; Or. Rev. Stat. §§ 30.260(4)(a), 174.109, 659A.001(4), (9)(b), 659A.030; Vt. Stat. tit. 21, §§ 495, 495d(1); Wash. Rev. Code § 49.44.090, *construed in Bennett v. Hardy*, 784 P.2d 1258, 1260 (Wash. 1990); Wis. Stat. §§ 111.32(6), .321-.322. One final state, Arkansas, prohibits only public employers from discriminating on the basis of age, and the law contains no numerosity requirement. *See* Ark. Code §§ 21-3-201, -203.

The Fire District responds that if a discrepancy were to exist between Title VII and the ADEA, "one would expect" a statute prohibiting race, religious, national origin, and sex discrimination to apply more broadly than one prohibiting age discrimination. *See* Petr. Br. 48. But surprisingly or not, it is beyond dispute that Congress cast a wider net with respect to the ADEA when it originally provided that it, but not Title VII, applied overseas. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256, 258-59 (1991). Congress acted similarly here.

Perhaps legislators in 1974 thought "that government should be a model of non-discrimination" on the basis of age. *See* Pet. App. 16a n.10. Or perhaps Congress determined, when amending the ADEA to cover political subdivisions, that there was a greater need for the statute to apply comprehensively. The Equal Protection Clause deems "an age classification [to be] presumptively rational," so public employees who suffer disparate treatment based on age have no federal law other than the ADEA to which they can realistically turn for relief. *See Kimel*, 528 U.S. at 83-88. By contrast, Title VII is only one of a broad array of federal laws that combat race and sex discrimination. The Equal Protection Clause requires exacting scrutiny to be applied to any public employment decision based on race or sex. *See Pers. Adm'r v. Feeney*, 442 U.S. 256, 272-73 (1979). And 42 U.S.C. §§ 1981 and 1983 similarly prohibit public employers—of any size—from discriminating on the basis of race. *See Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 730-31 (1989) (plurality opinion); *Burnett v. Grattan*, 468 U.S. 42, 50 (1984); *see also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978). Consequently, employees of political subdivisions such

as the Fire District need not depend on Title VII's protections in the same way they must rely on the ADEA's.

Even if it were anomalous for the ADEA, but not Title VII, to cover small political subdivisions, it still would not matter. "[A]nomalies often arise from statutes, if for no other reason than that Congress typically legislates by parts—addressing one thing without examining all others that might merit comparable treatment." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033 (2014). Such is the legislature's prerogative. Accordingly, "[t]his Court does not revise legislation . . . just because the text as written creates an apparent anomaly." *Id.*

B. Section 630(b) creates no problem with respect to the ADEA's coverage of agents.

The Fire District next contends that the Court must set aside the plain meaning of Section 630(b)'s political subdivision clause because it is "flatly incompatible with the agent clause." Petr. Br. 27. Specifically, the Fire District insists that reading the statute to cover small political subdivisions creates two problems with respect to the ADEA's application to agents: (1) it subjects individual employees of private employers to personal liability, *see id.* 28-30; and (2) it eliminates respondeat superior liability for public employers, *see id.* 50-51. But, in reality, the statute does not necessarily give rise to either of these things. If anything, it is the Fire District's reading of the statute—under which the agent clause would serve only to reiterate that employers are subject to respondeat superior—that should give this Court pause.

1. The Fire District is right about one thing: "If the phrase 'also means' [in Section 630(b)] adds a category of employer not covered by the first sentence," then "agents" of covered private employers constitute an additional category of "employer." Petr. Br. 28. But it hardly follows that supervisors and other individual employees may be held individually liable for violating the ADEA.

As this Court has recognized regarding Title VII's identically worded agent clause, the clause covers a category of employers wholly distinct from individual employees. Specifically, the clause covers third-party independent contractors, preventing employers from "delegating discriminatory programs to corporate shells." *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 718 n.33 (1978). Thus, as numerous courts of appeals and the EEOC have recognized, "[w]here the employer has delegated control of some of the employer's traditional rights, such as hiring or firing, to a third party, the third party has been found to be an 'employer' by virtue of the agency relationship." *Williams v. City of Montgomery*, 742 F.2d 586, 589 (11th Cir. 1984) (quoting Barbara Lindemann Schlei & Paul Grossman, *Employment Discrimination Law* 1002 (2d ed. 1983)); *see Morgan v. Safeway Stores, Inc.*, 884 F.2d 1211, 1214-15 (9th Cir. 1989); *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1063 (2d Cir. 1982), *vacated mem. on other grounds*, 463 U.S. 1223 (1983); *see also EEOC Compliance Manual*, *supra*, § 2-III(B)(2)(b) ("An entity that is an agent of a covered entity is liable for the discriminatory actions it takes on behalf of the covered entity.").

Recognizing that Section 630(b)'s agent clause sweeps in third-party entities that would not otherwise be included in the statute's definition of "employer" is enough to give independent meaning to the clause. Accordingly, this Court need not decide here whether individual employees—such as supervisors or human resource managers—are *also* swept in by the agent clause. The Court could decide in the future that the clause does not apply to individual employees, or it could hold that the clause allows at least some individuals to be held personally liable for violating the ADEA.[7]

2. The Fire District is also wrong to assume that Section 630(b)'s reference to private agents as a separate category of employer—coupled with the absence of any such reference to public employer agents—"eliminate[s] respondeat superior liability" for public employers' age discrimination. Petr. Br. 50. The Fire District's assumption proceeds from the premise that the agent clause provides the only possible "basis for imposing respondeat superior

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[7] If this Court were to reach the latter conclusion, it would not, as the Fire District claims, be "unprecedented." Petr. Br. 28. Some district courts have held that the ADEA imposes individual liability. *See, e.g.*, *Weeks v. Maine*, 871 F. Supp. 515, 517 (D. Me. 1994). In addition, the FLSA—which, like the ADEA, subjects any employer who violates the Act to liability, *see* 29 U.S.C. § 216—imposes personal liability on employees who "independently exercised control over the work situation." *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 195 (5th Cir. 1983) (citing cases from several circuits); *see also* Daniel B. Abrahams et al., *Public Employer's Guide to FLSA Employee Classification* ¶ 730 (2015). The consensus among the courts of appeals is that the Family and Medical Leave Act (FMLA) does so as well. *See Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 422 (2d Cir. 2016) (citing cases from several circuits).

liability" on employers. *See id.* But that premise is incorrect.

A lawsuit for discrimination "is, in effect, a tort action." *Meyer v. Holley*, 537 U.S. 280, 285 (2003); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 264-65 (1989) (O'Connor, J., concurring in the judgment). And "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Meyer*, 537 U.S. at 285; *see also id.* (collecting similar authority with respect to other types of causes of action); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles.").

"It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Meyer*, 537 U.S. at 285; *see also id.* (the Fair Housing Act incorporates such liability even though text of the statute "says nothing about vicarious liability"); *Balt. & Potomac R.R. Co. v. Fifth Baptist Church*, 108 U.S. 317, 330 (1883) (principle that corporations "are equally responsible for injuries done in the course of their business by their servants" is "so well settled as not to require the citation of any authorities in its support"). Accordingly, the very "prohibition against discrimination by an 'employer' . . . necessarily embodies respondeat superior principles on its own." *Ball v. Renner*, 54 F.3d 664, 667 (10th Cir. 1995). That is, the ADEA inherently renders public employers—like private employers—subject to respondeat superior liability, irrespective of any agent clause.

3. If anything, it is the Fire District's reading of Section 630(b) that gives rise to problems with respect to the statute's agent clause.

For starters, the Fire District's proposed construction of the agent clause renders it superfluous. As just discussed, well-established legal principles ensure—regardless of any explicit reference to "agents"—that a covered employer can be held liable under the ADEA for the discriminatory acts of its supervisory employees. It is hardly necessary for the agent clause to "clarify[]," Petr. Br. 30, what is already built into the statute.

Citing cases involving 42 U.S.C. § 1983 and Title IX, the Fire District maintains that without the agent clause, Section 630(b) could have "be[en] read to exclude" respondeat superior liability. Petr. Br. 31. But the Court's interpretations of Section 1983 and Title IX do not cast light on whether the ADEA's agent clause is necessary to establish respondeat superior liability. Section 1983 imposes liability on "persons," not employers. *See* 42 U.S.C. § 1983. It is therefore unsurprising that respondeat superior is not incorporated into the statute. Title IX, meanwhile, does not even contain an express cause of action; instead, the Court has recognized an implied right of action. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998). In that situation, the canon that Congress creates causes of action against the backdrop of the common law does not govern. *See id.* at 284-85.

Second, recall that the Fire District's basic contention is that the "also means" sentence—which includes the agent clause—merely "clarifies which . . . entities are included in the definition of 'employer' in § 630(b)'s first sentence, without separately

delineating additional categories of employers." Petr. Br. 15. If that were correct, then the ADEA would allow employers an end run around the statute "by delegating discriminatory programs to corporate shells," *Manhart*, 435 U.S. at 718 n.33. Workers who are subjected to discrimination by such third-party entities—for example, a company hired to perform layoffs—would not be able to sue their employers, for respondeat superior does not generally reach the conduct of independent agents. *See* Restatement (Second) of Torts § 409 (1965). And such workers could not sue the third-party entities, for they would not be "employers" under the Fire District's limited construction of the ADEA's agent clause.

C. Section 630(b) raises no constitutional concerns.

The Fire District next argues that reading the ADEA to cover political subdivisions regardless of size would tread on state sovereignty and overstep Congress's power to regulate commerce. Petr. Br. 36-37. Neither constitutional principle is implicated here.

1. The rule that federal statutes should not be construed, absent a clear statement, to intrude on state sovereignty does not apply where the statute is "unambiguous"—that is, where the statute's meaning is "plain to anyone reading [it]." *Salinas v. United States*, 522 U.S. 52, 60 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991)). For that reason alone, the clear statement rule does not apply here.

Even if Section 630(b) were ambiguous, the result would be no different. The clear statement rule applies only when federal law "implicate[s] 'a decision of the most fundamental sort for a sovereign entity.'" *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 n.5

(1995) (quoting *Gregory*, 501 U.S. at 460). Such is not the case here. By the Fire District's telling, Section 630(b) "overrides state judgments as to what sized agencies and political subdivisions can tolerate the burdens of age-discrimination litigation." Petr. Br. 38. But this Court has already held that federal laws restricting "a State's authority to set the conditions upon which its political subdivisions are subject to suit" do not trigger the clear statement rule. *Jinks v. Richland County*, 538 U.S. 456, 466 (2003).

Nor does preventing states themselves from discriminating based on age "portend[] any[] . . . profound threat to the structure of state governance." *Wyoming*, 460 U.S. at 240. In *Wyoming*, this Court determined that the extension of the ADEA to cover state and local governments did not tread on states' sovereignty or their Tenth Amendment immunity, even under the more state-friendly regime of *National League of Cities v. Usery*, 426 U.S. 833 (1976), that was later overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). *See Wyoming*, 460 U.S. at 239-42.

2. Treating small political subdivisions as employers under the ADEA does not test the bounds of Congress's Commerce Clause powers.

This Court has made clear that Congress may regulate economic activity under the Commerce Clause whenever such activity "substantially affects interstate commerce." *United States v. Lopez*, 514 U.S. 549, 560 (1995); *see also United States v. Morrison*, 529 U.S. 598, 610 (2000). Employment is quintessential economic activity. And when "viewed in the aggregate," *Lopez*, 514 U.S. at 561, the

employment activity covered by the ADEA substantially affects interstate commerce.

Lest there be any doubt, the FLSA covers public employers regardless of size, *see* 29 U.S.C. § 203(d)-(e), and it expressly provides that all such entities are "engaged in commerce," *see id.* § 203(s)(1)(C). This Court has recognized that these dictates "undoubtedly [fall] within the scope of the Commerce Clause." *See Nat'l League of Cities*, 426 U.S. at 841-42.

The Fire District points out that Section 630(b) characterizes the private employers it covers as "engaged in an industry affecting commerce." Petr. Br. 40 (quoting 29 U.S.C. § 630(b)). Yet the Fire District cites no case holding that this qualifier is necessary to sustain the ADEA. Congress probably inserted the "affecting commerce" phrase to make clear it was "invok[ing] the full breadth of its Commerce Clause authority to achieve [its] end." *See Carr v. United States*, 560 U.S. 438, 454 (2010); *see also Pol. Nat'l All. v. NLRB*, 322 U.S. 643, 647-48 (1944). But whatever the reason, a plain reading of Section 630(b)'s political subdivision clause does not raise any constitutional concerns.[8]

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[8] This is not the only occasion on which Congress has applied an "affecting commerce" element to private, but not public, employers. The FMLA covers employers "in any industry or activity affecting commerce." 29 U.S.C. § 2611(4)(A)(i). But for the purposes of the provision including public agencies within the FMLA's definition of employer, "a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce." *Id.* § 2611(4)(B); *see also Haybarger v. Lawrence County Adult Prob. & Parole*, 667 F.3d 408, 416-17 (3d Cir. 2012); *Modica v. Taylor*, 465 F.3d 174, 185-86 (5th Cir. 2006).

D. Section 630(b) does not threaten to disrupt the operations of political subdivisions.

Finally, the Fire District asks this Court to disregard the plain meaning of Section 630(b) because it portends "devastating effects" on political subdivisions. Petr. Br. 17. This contention is overwrought.

1. If, as the Fire District contends, applying bans on age discrimination to small political subdivisions would "threaten the[ir] survival," Petr. Br. 54, one would expect states themselves to refrain from doing so. Yet "almost every State of the Union" requires political subdivisions to pay "money damages" if they discriminate on the basis of age. *Kimel*, 528 U.S. at 91. Thirty states—including several, such as Alaska and Wyoming, that are "rural and sparsely populated," Petr. Br. 55—have such laws covering all political subdivisions, regardless of size. *See supra* at 29 n.6. And several other states have numerosity requirements in the single digits for such entities. *See* Petr. Br. 39 (citing statutes from numerous states); Iowa Code § 216.6(1)(a), (6)(a).

The Fire District identifies no adverse consequences of those statutes. There is no good reason to think, therefore, that reading the ADEA's definition of employer according to its plain terms would suddenly kill off small political subdivisions.

2. At any rate, there are numerous ways in which political subdivisions limit litigation costs. For one thing, many small political subdivisions are integrated with larger subdivisions that ultimately pay any litigation bills or judgments. Take, for instance, *Cink v. Grant County*, 635 Fed. Appx. 470 (10th Cir. 2015), a case the Fire District cites favorably, *see* Petr.

Br. 9, 25. In that case, the Tenth Circuit held that an employee of a sheriff's department with fewer than twenty employees could bring an ADEA lawsuit against the county because the former was a subordinate department of the latter. 635 Fed. Appx. at 474-76. The sheriff's department did not need to pay a penny.

What is more, the vast majority of public employers participate in insurance pools that cover discrimination lawsuits. *See, e.g.*, Karen Nixon, Pub. Agency Risk Sharing Auth. of Cal., *Public Entity Pooling—Built to Last* 3 (2011), http://www.cajpa. org/documents/Public-Entity-Pooling-Built-to-Last.pdf (noting that 85% of counties, townships, municipalities, school districts, and special districts nationwide participate in risk pools). The Fire District responds that "insurance does not make new legal expenses disappear; it simply packages them as premiums" that are sure to "spike" if the ADEA applies here. Pet. Reply 11. But insurance pools cover all manner of state and federal claims, including "general liability, professional liability, auto liability, property, and workers compensation." Marcos Antonio Mendoza, *Reinsurance as Governance: Governmental Risk Management Pools as a Case Study in the Governance Role Played by Reinsurance Institutions*, 21 Conn. Ins. L.J. 53, 56 (2014). The notion that the ADEA coverage alone could somehow dramatically affect the calculus of these insurance pools seems rather farfetched.

* * *

For all the Fire District's argumentation, it is important not to lose sight of what it actually seeks here—a free pass under federal law to discriminate on

the basis of age. No matter how blatant or unjustified its reliance on age, the Fire District seeks immunity for "inflict[ing] on individual workers the economic and psychological injury accompanying the loss of the opportunity to engage in productive and satisfying occupations," *Wyoming*, 460 U.S. at 231. Even if the Fire District were right that reading the ADEA according to its plain meaning will put more pressure on political subdivisions to refrain from engaging in such conduct, that would be a *good* thing. Eliminating age discrimination from the American workplace is exactly what the ADEA is designed to do.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

Jeffrey L. Fisher
David T. Goldberg
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Don Awerkamp
Counsel of Record
Shannon Giles
AWERKAMP, BONILLA &
GILES, PLC
6981 North Oracle Road
Suite 155
Tucson, AZ 85704
(520) 798-5282
da@abdilaw.com

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